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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 907

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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January 15, 1947.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Eighth Circuit.

The Texas and Pacific Railway Company prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on November 27, 1946, affirming the judgment of the District Court of the United States for the Eastern District of Missouri. The said judgment became final on December 16, 1946, when the said Court without opinion denied petitioner's petition for a rehearing (Record page 609).

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is unreported as yet. It will be found at page 589 of the Record herein.

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; Title 28, U. S. C. A., Sec. 347). See cases cited under Reasons for Granting the Writ.

QUESTIONS PRESENTED.

1) The Mandatory Freight Accounting Rules formulated by the Railroad Accounting Officers Association provide for the submission of disputes over the interpretation and application of the Accounting Rules to the Interline Freight Accounting Arbitration Committee with the right to appeal to an Appeal Committee. Where these Committees decide that there is no violation of the Accounting Rules while a dispute exists over the legality of the divisions of a joint rate used in interline settlements, which dispute said Committees refuse to decide because it involves the determination of legal questions which are beyond their jurisdiction; is the carrier to whom they deny relief precluded from seeking redress in the Courts?

2) If the divisions claimed by such losing carrier are determined by the courts to be the correct divisions lawfully applicable to the shipments in question, can a "collecting" or "settling" carrier be required to account for them to prior lines in accordance with the accounting practices prescribed in the Mandatory Freight Accounting Rules, notwithstanding the fact that the Arbitration Committees denied relief?

3) Did the Illinois Lines have any legal right by unilateral action to terminate their agreement to accept a division of 6½¢ per cwt. out of the through rate applicable to these shipments and over the objection of the other participating carriers to arbitrarily exact a division of 10¢ per cwt.?

4) Did the divisions of the through rate involved in this case that were set out in the published Division Sheets, Claimant's Exhibits 21 and 22 (Record pages 102, 107), lawfully apply to these shipments?

5) Did the accounting rules and practices agreed to by petitioner and respondent herein require respondent to collect the freight to East St. Louis in accordance with these Division Sheets and account to petitioner for its division as therein set out?

STATEMENT.

The opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit here sought to be reviewed, affirmed the judgment of the United States District Court for the Eastern District of Missouri dismissing a claim filed by The Texas and Pacific Railway Company, petitioner herein, against St. Louis Southwestern Railway Company, respondent herein and debtor in the reorganization proceedings below. The claim seeks to recover $64,424.46, and interest, due petitioner as its agreed division of the through rate on certain shipments of crude oil moving from Wickett, Texas, to Whiting, Indiana (see Proof of Claim, Record pages 2 to 12).

The facts are as follows:

Petitioner operates a line of railroad from Wickett to Big Sandy, Texas. Respondent and its Texas subsidiary operate lines of railroad from Big Sandy to St. Louis, Mis-

souri, and East St. Louis, Illinois. The Alton Railroad Company, the Chicago & Eastern Illinois Railroad Company, the Illinois Central Railroad Company and the Wabash Railroad Company, hereinafter called "the Illinois trunk lines," operate lines of railroad to connecting points with the Elgin, Joliet & Eastern Railroad Company that runs thence to Whiting, Indiana. These railroads all maintain through routes and interchange traffic on joint rates from Wickett, Texas, and other points to Whiting, Indiana, and other points. (See Stipulation of Facts, Sec. 1, Record pages 31, 32.)

About twenty years ago oil began to be produced in the neighborhood of Wickett on Petitioner's line in Western Texas and a movement developed in large quantities to Whiting, Indiana, and other refineries. To handle this movement a joint rate of 37¢ per cwt. was published applicable over the above routes from Wickett to Whiting effective November 24, 1927, Stipulation, Sec. 4 (Record page 33 and Record page 46), and C. Exh. 1 (Record page 49), later reduced to 32½¢ per cwt. effective September 18, 1928, Stipulation, par. 4 (Record page 35 and Record page 56), and C. Exh. 5 (Record page 57). This joint through rate of 32½¢ divided 6½¢ to the Illinois trunk lines, including the services of the Elgin, Joliet & Eastern Railroad Company, and the balance of 26¢, accruing for the services up to East St. Louis, divided 16.9¢ to Appellant and 9.1¢ to Appellee, including its Texas subsidiary. Stipulation, Sec. 4 (Record pages 35, 36 and Record page 61 et seq.), and C. Exh. 21 and C. Exh. 22 (Record pages 102 and 107).

The shipments in question all originated on Petitioner's line at Wickett, Texas, and in each instance through waybills were issued by Petitioner's agent at Wickett, Texas, to accompany the shipments. These waybills describe the shipment, the route of movement and showed destination

to be Whiting, Indiana. In other words, they were what is known as "through waybills" and if Petitioner's shipping instructions had been followed the shipments would have all gone through on these waybills to Whiting, Indiana, and the Elgin, Joliet & Eastern, as the waybill destination carrier, would have been required to collect the freight charges and distribute the revenue as between all carriers participating in the movement in accordance with their published divisions. The opinion below so concedes (Record page 593):

> "On shipments moving on through billing, freight charges collect, the destination carrier collects the charges from the consignee and accounts to prior carriers for their established divisions of the applicable rate. Appellant and appellee agree that the destination carrier on shipments moving on through billing is obligated under the Mandatory Freight Accounting Rules, as well as by law, to collect the lawful freight charges from the consignee, and is responsible to the other participating carriers for the distribution of the freight charges in conformity with an existing valid agreement for the division of the charges among them."

Respondent, however, failed to follow the shipping instructions as shown on the waybills accompanying the shipments but, on the contrary, when they arrived at East St. Louis, Respondent changed the heading on the waybills by striking out the words "Whiting, Indiana." and inserted in red ink the words "East St. Louis, Illinois," thereby changing the waybill destination of these shipments from Whiting, Indiana, to East St. Louis, Illinois. Respondent thereupon terminated the original waybills at East St. Louis and delivered the shipments to the Illinois trunk lines at East St. Louis on what was called "junction settlements," and the Illinois lines thereupon handled the shipments to Whiting, Indiana, on **new waybills** issued by them at East St.

Louis and covering the route of movement from East St. Louis to Whiting (Stipulation, Sec. 5, Record pages 37, 38; C. Exh. 35, Record page 175; Record pages 164-166-168). It is admitted that the purpose of Respondent in thus changing the waybill instructions, so as to terminate the waybills at East St. Louis, was to enable it to immediately collect the revenue accruing to East St. Louis so as to get ready cash that it then needed very badly wherewith to operate its railroad (Stipulation, Sec. 5, Record page 38, and Record pages 482, 518).

Under this "junction freight settlement plan" the Illinois lines receiving the shipments on junction transfer were required under the railroad accounting rules to advance and pay the proper revenue up to the junction point, and thus Respondent was enabled to make immediate collection of large sums which it otherwise would not have been able to collect from the Elgin, Joliet & Eastern R. R. Co. until the 25th of the following month (Record page 357; Rule 135, Record page 570; Rule 106, Record page 196). These collections during the period in question amounted to a very large sum of money (Record page 357).

In settling these waybills at East St. Louis with the Illinois trunk lines Respondent rendered freight bills to the Illinois trunk lines computed on the proper revenue of 26¢ per cwt., being the portion of the through rate lawfully accruing to East St. Louis. The Illinois trunk lines wrongfully and unlawfully cut these freight bills to 22½¢ per cwt. (Claimant's Exhibit No. 36, Record page 177). The facts establishing agreement on the part of the Illinois Lines to accept 6½¢ per cwt., and the circumstances involved in their breach of that agreement will be more fully stated in the supporting brief. Instead of proceeding to collect the balance of 3½¢ lawfully due, Respondent, after some protest, acquiesced in the cut, and undertook to

charge part of it back to Petitioner. This we contend it had no legal right to do and it is to recover the amounts so improperly charged back to Petitioner that this claim was filed.

The major railroads of the United States, including the parties hereto, maintain a set of accounting rules and practices known as Mandatory Freight Accounting Rules which, as the name implies, and the parties hereto have stipulated, and the evidence proves, control the settlement of all interline freight accounts (Record page 32 [3] and Record pages 162, 163).

Rule 118 (Record page 570) reads as follows:

> "Rule 118. Responsibility for Collection and Settlement of Waybills. The waybill destination carrier shall be responsible for the collection of the proper revenue to waybill destination, and for the proper reporting to all roads interested, regardless of the final destination of the shipment."

This rule, as will be more fully argued in the supporting brief, imposes upon the carrier making junction settlement (the waybill destination carrier) the same obligation to collect "proper revenue" to the junction point, as the opinion below concedes (see quotation, supra) rests upon the delivering carrier at final destination to collect the "lawful freight charges" on shipments moving on **through** waybills. In both cases the collecting carrier must settle the waybills, collect the revenue lawfully due, and account for it to prior lines regardless of whether collections have been accomplished (Rule 68, Record pages 561-568).

The Mandatory Freight Accounting Rules provide a procedure whereby disputes over the interpretation and application of the accounting rules may be submitted to the interline freight accounting Arbitration Committee for a

ruling. See Rules 272, 280, 281, 282, 300 and 301, Record pages 572 to 574.) However, the powers of these Arbitration Committees are strictly limited to the interpretation and application of the rules (Rules 272 and 280), they have no equity powers (Rule 281). It is a mere accounting procedure to obtain an interpretation of the rules and, as will be more fully argued under the heading "Reasons for Granting Writ," does not preclude actions at law or in equity to enforce legal rights and liabilities arising out of said rules.

There is authority for the view that resort to this arbitration was implied in the Mandatory Freight Accounting Rules to which the parties hereto have agreed, and hence was a condition precedent to any right of action in court (6 C. J. S., Arbitration and Award, Section 29, page 169). Therefore, when Respondent refused to embody Petitioner's "Statement of Differences" in a "Correction Account" (Rule 79, Record page 569) we submitted the following issue to the Arbitration Committee, to-wit (Record page 327):

> "Issue to Be Determined.
>
> "28. The issue to be determined is whether the St. Louis and Southwestern Railway shall issue a correction account in accordance with Texas and Pacific Railway statements of differences allowing the Texas and Pacific Railway $64,536.36."

In so doing we thought that the action of the Illinois lines was so arbitrary and in violation of the Act to Regulate Commerce (49 U. S. C. A., Sec. 15 [6]) as well as of elementary principles of contract law, that the Arbitration Committee could say that there was no legitimate dispute about the divisions, and that the Illinois lines having published their participation in the 32½¢ joint rate (Record pages 59-60), the published Division Sheets (C. Exh. 21,

Record page 102, and C. Exh. 22, Record pages 103-105 and 107), reflecting the prior divisional agreement would apply until changed by carrier agreement or action of the Interstate Commerce Commission, and thus the Arbitrators could require Respondent, the waybill destination carrier who settled these waybills, to account as in ordinary cases where the divisions were agreed upon.

The Arbitrators, however, refused to admit this premise. They held that a divisional dispute existed and that they were without jurisdiction to settle it. They did **not** decide, as inadvertently stated in the opinion below, that "neither Rule 118 or 79 had any application on the question before them * * * and this without regard to ultimate decision of that dispute by the courts and by the Commission" (Record page 599).

The most that they can be said to have ruled is that **while** this dispute existed there was no violation of the accounting rules in accepting what revenue the Illinois line tendered (Rule 143, Record page 571) and in distributing it "on a reasonable basis pending adjustment when correct divisions are ascertained" (Rule 107, Record pages 569 and 570).

The decision of Arbitrator Tague makes this clear (Record page 269), to-wit:

> "From the foregoing it is my conclusion that **while** the question of these divisions were in dispute and the subject matter of correspondence between Traffic Departments of the roads involved, the Illinois Freight Association, and the Interstate Commerce Commission, there was no violation of mandatory accounting rules."

Such a ruling did not settle the matter. It left open the dispute itself, to-wit: whether or not the division sheets (C. Exh. 21 and C. Exh. 22) applied to these ship-

ments, and also left open the issue of how and by whom this so-called dispute was to be settled and the "proper revenue" collected. These issues were controlling, they were the crux of the case, and the arbitration committees left them entirely undecided. This record shows that Respondent contended all through the arbitration proceeding that the above issues were "for the courts to decide" and that "the arbitration committee has no jurisdiction over the issue raised by The Texas and Pacific Railroad Company." (See extracts from Respondent's briefs, Record pages 332, 333.) The arbitration committee agreed with Respondent, Arbitrator Price pointing out that appellant "may have legal rights in court" (Record page 331).

We have, therefore, a situation where the arbitrators' interpretation of the rules left the matter unsettled and undecided, because it involved the determination of legal questions over which they had no jurisdiction. In such cases all the authorities hold that resort may be had to the courts [6 C. J. S., Sec. 95, page 241, Notes 54-55; 6 C. J. S., Sec. 96 (b), page 242, Note 68; 5 C. J. 162, Notes 76-77].

Nevertheless, the opinion below ruled (Record pages 599, 600) that

> "The controlling issue in the case having been submitted to arbitration and decided, the decision of the arbitrators is binding on the courts."

Such a ruling we submit is untenable and in conflict with the weight of authority.

Such further facts as are necessary will be stated under Reasons for Granting the Writ and in the argument in the brief supporting this petition.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

1) in holding that the controlling issue in the case had been submitted to arbitration and decided.

2) in holding that the decisions of the Arbitration Committees adjudicated petitioner's rights under the established accounting rules and practices.

3) in refusing to decide the issue of the legality of the action of the Illinois lines in exacting a division of 10¢ per cwt.

4) in refusing to hold that the Illinois lines were only entitled to a division of 6½¢ per cwt. on the shipments in question.

5) in refusing to hold that the "proper revenue" lawfully accruing to East St. Louis was 26¢ per cwt.

6) in refusing to hold that respondent was responsible for the collection of 26¢ per cwt. on these shipments.

7) in refusing to hold that petitioner was entitled to a division of 16.9¢ per cwt. on the shipments herein and that respondent was obligated to account to petitioner therefor.

8) in refusing to hold that petitioner was entitled to recover the amount of this claim and interest.

REASONS FOR GRANTING WRIT.

A.

The Circuit Court of Appeals Has Decided Important Questions of Law in a Way That Is Untenable and in Conflict With the Weight of Authority.

1.

An immense amount of traffic moves annually over the railroads of the United States on joint rates. The col-

lection, division and interline settlement of the revenue accruing from these joint rates involves a tremendous amount of accounting. To simplify this problem and provide a uniform procedure, the Railway Accounting Officers' Association formulated, and the major railroads of the United States have accepted and agreed to, a set of Mandatory Freight Accounting Rules that, by their terms, are **mandatory** and **binding** on all railroads of the United States members of the Association, including all the railroads participating in the shipments involved in this case (Rule 1, Record page 567, and testimony of Oliver, Record pages 162-3).

Literally billions of dollars of revenue is annually collected and accounted for under the provisions of these rules.

These rules place the responsibility upon the waybill destination carrier to collect and account for the "proper revenue to waybill destination regardless of the final destination of the shipment" (Rule 118, Record page 570). East St. Louis was the waybill destination and respondent was the waybill destination carrier (Record, bottom page 193 and page 194). The legal effect of the accounting rules and practices involved in this case has never been authoritatively determined, nor has there been any authoritative decision as to the scope and effect of the decisions of the Arbitration Committees in cases of disagreement over the interpretation of the rules (Rule 272, Record page 572). These questions are of prime importance to all the railroads of the United States whose interline settlements are governed by these Mandatory Freight Accounting Rules. These questions are novel and the Circuit Court of Appeals has decided them in a way that is untenable, and in conflict with the principles of the common law and the weight of authority, and we submit that the matter is of sufficient importance to call for the exercise of the

supervisory power of this Court. Even in cases where the decision sought to be reviewed does not conflict with other decisions, this Court has granted certiorari solely "because of the nature and importance of the case" (Mackay Radio & Telegraph Co. v. Radio Corp., 306 U. S. 86, l. c. 89, and compare Cyclopedia of Federal Procedure, 2d Edition, Vol. 11, Sec. 5413, footnote 44).

The Court of Appeals has wholly misconceived the effect of the decisions of these Arbitration Committees. The procedure in the Mandatory Freight Accounting Rules for submitting disagreements over the interpretation of the Rules to the Arbitration Committees, is no different than the familiar provision in ordinary contracts for the submission of certain questions such as quality, quantity, price, etc., to arbitration, and such provisions are held to be implied conditions precedent to any right of action in Court. In such cases resort to arbitration does not preclude court action, but is a condition precedent to such action. (6 C. J. S., Arbitration and Award, Sec. 29, page 169; Palmer v. Fix, 286 Pacific [California] 498, Syll. 11, l. c. 501, par. 11.)

The Arbitration Committees in this case did not by interpretation limit in any way the obligation placed on the waybill destination carrier by Rule 118 to collect the proper revenue. All that they decided was that while that revenue was in dispute there was no violation of the Mandatory Freight Accounting Rules in failing to account for it. The decision of Arbitrator Tague (Record page 269) is typical (see quotation supra under heading "Statement"). Such a decision did not settle the matter. It expressly left open the dispute itself, to-wit: the legality of the action of the Illinois lines in arbitrarily increasing their divisions, and it left open the further question of whether or not it was respondent's duty under established accounting rules and practices to collect this illegal exac-

tion from the Illinois lines, and account to prior lines in accordance with their agreed divisions. These were the controlling issues, and the Arbitration Committees did not decide them. The reason they left them undecided was because they considered them to be legal questions and hence beyond their jurisdiction. The decision of Arbitrator Price is typical and makes this clear (Record page 331).

> "Question (4). Under the mandatory rules are the Arbitration Committees of this Association authorized to pass upon the **legality** of the divisions used in interline settlements **or** the **legal rights** of the interested parties in an arbitration case of this kind? Answer. It is **not** understood that the Arbitration Committee, or the Appeal Arbitration Committee, is vested with such authority.
>
> "In view of all facts and evidence as shown in the papers, I agree with the unanimous decision of the arbitrators, and it is the decision of this appeal arbitrator that while the Texas & Pacific Railway Company may have had the right to present the case to the Interstate Commerce Commission, **or may have legal rights in court**, it has no cause of action against the St. Louis Southwestern Railway Company under the mandatory rules of this Association. The Texas & Pacific Railway Company should, therefore, assume the arbitration and appeal fees in accordance with the requirements of Mandatory Rule 300, effective January 1, 1936."

Counsel for respondent conceded, in fact argued, all through the arbitration that the Committees had no jurisdiction of the issues involved in this claim. We quote the following from respondent's brief before the Arbitration Committees:

The first brief respondent filed said (Claimant's Exhibit 26, Record pages 332, 318):

> "The Arbitration Committee has no jurisdiction over the issue raised by the Texas and Pacific Railway."

And in its reply brief it said (Claimant's Exhibit 26, Record pages 332, 281):

> "Whether the Illinois Lines' refusal to observe the 6.5¢ division constituted an illegal act cannot be decided by the Arbitration Committee, the Texas and Pacific or the St. Louis Southwestern Railway Lines. **That is a question for the courts to decide.**"

And further on the same page it said (Record pages 332, 281-2):

> "The rate of 32½¢ was not established until September 18, 1928, and until some court of competent jurisdiction has decided whether the agreement of the Illinois Lines to accept 6.5¢ out of the rate is enforceable by law, the disagreement must of necessity be considered a dispute between Traffic Departments."

And the brief concludes (Record pages 332, 288):

> "There are no issues to be determined by this Committee. It is unnecessary to repeat the conclusion shown in our original brief. The arbitration should be dismissed at the cost of the Texas & Pacific."

In its brief on appeal respondent said (Claimant's Exhibit 46, Record pages 332, 234):

> "Arbitrators are not judges of the law. They are governed solely by the arbitration agreement and by accounting rules; quotations of decisions of the Supreme Court, or other courts, are irrelevant and immaterial."

Also in the same brief respondent said (Claimant's Exhibit 46, Record page 238):

> "No contention is here made that the agreement of the railroads which are members of the Association of American Railroads is not binding, but we do contend that such rules must be strictly construed, and that jurisdiction is not conferred thereby to adjudicate matters of law."

And the brief concludes (Claimant's Exhibit 46, Record pages 333, 243):

> "Nothing in the arbitration act requires the arbitrators to decide questions of law. The Texas & Pacific Railway Company has had its decision. If it desires to litigate **the courts have not ceased to function.**"

Other statements to the same effect can be found elsewhere in respondent's brief before the arbitrators, and Mr. Barrett, whose name is signed to these briefs, while testifying in this case expressed the opinion that the arbitrators are without jurisdiction to decide disputes over divisions (Record page 488).

The arbitrators agreed with respondent and ruled in effect that the application of the published division sheets to the shipments in question was a legal question that they were without jurisdiction to decide.

In short, both committees refused to hold respondent to the accounting rules because the application of those rules depended upon the legality of the action of the Illinois Trunk Lines in cutting debtor's freight bills at East St. Louis, a legal question which they held they were without authority to decide.

It is thus apparent that the issues involved herein were in the opinion of both arbitration committees not within their jurisdiction and they refused to decide them, and we contend the trial court so found (see Finding of Fact No. 5, Record page 576), to the effect that the issue of the legality of the action of the Illinois Lines, and the question of the proper revenue accruing to East St. Louis, were not decided by the arbitrators in the arbitration proceedings.

The law is settled that under the above circumstances the award is not conclusive and does not preclude resort to the courts. (See 6 C. J. S., Sec. 95, page 241, Notes 54 and 55, where it is said:)

> "Of course an award cannot be conclusive or binding as to matters which the arbitrators **have no authority to decide**, or which cannot properly be regarded as included in the award (See Supra Sec. 80), **nor as to matters on which the arbitrators do not intend to render a final or binding** decision. Hence an award **is not conclusive as to questions of law**, which it, by its terms, refers to the decision of the court, **either declining to decide them**, or deciding subject to such court revision."

Also: 5 C. J. 162, Notes 76 and 77:

> "So an exception to the general rule making awards conclusive arises where the award by its terms refers questions of law to the decisions of the court, either declining to decide them, or deciding them subject to such revision. Under these circumstances the court will revise the award because, if erroneous in law, it necessarily follows that it is not what the arbitrators intended."

Also: 6 C. J. S., Sec. 96 (b), p. 242, Note 68, where it is said:

> "Where the arbitrators refuse to consider a claim because they deem it not to be within their jurisdiction under the submission, such claim may properly be made the basis of an action."

We submit, however, that if this court decides the published division sheets were legally applicable, then it is perfectly apparent from all the opinions in the arbitration proceeding that petitioner **would** have a cause of action under the accounting rules.

Therefore we submit the trial court's conclusion of law No. 3 (Record page 577) to the effect that the award of

the Arbitration Committees adjudicated petitioner's rights under the rules is untenable, and the decision of the Court of Appeals affirming that ruling is likewise untenable.

We further submit that the opinion below creates uncertainty and confusion. All of the major railroads of the United States use these Mandatory Freight Accounting Rules, and they are left in a state of uncertainty as to how far their legal rights are prejudiced by the decisions of these Arbitration Committees. If the carrier whose revenue is withheld brings suit it will be said that under the Mandatory Freight Accounting Rules arbitration is a condition precedent, and failure to submit the dispute to an arbitration committee bars the suit. If, on the contrary, the carrier submits the matter to an arbitration committee and that committee, as in this case, because of its limited jurisdiction, cannot decide the issue, then the opinion below would preclude any resort to the courts. Such a situation is obviously illogical and untenable, and when we consider the enormous amount of traffic that moves annually under joint rates, and the immense sums of money that waybill destination carriers must distribute annually in interline settlements, it is clearly of the highest importance that the obligations of these settling carriers to prior lines be authoritatively determined, and we submit that it properly calls for the exercise of the supervisory power of this Court.

II.

The opinion below further rules (Record page 592), to-wit:

> "If we concede for the argument that appellant is correct in its contention that the lawful rate on crude petroleum from Wickett to Whiting was 32.5 cents, in which the Illinois Trunk Lines were bound by contract with appellant and appellee to participate for a

> **division of 6.5 cents, a question which we do not decide, it would seem that appellant's remedy was an action against the Elgin, Joliet & Eastern, the carrier which collected all freight charges, for the recovery of the lawful division of the established rate."**

This would be correct if the shipments had gone through on through waybills and the delivering carrier at final destination (E. J. & E.) had been the settling carrier. It is not correct where the waybills terminated at a junction point short of final destination and the inbound carrier at the junction (respondent) is the settling carrier [C. Exh. 45, Definition (14), Record page 212 and Record bottom page 200). In such case the established accounting rules and practices require the inbound carrier at the junction to collect and the outbound carrier at the junction to pay the proper revenue accruing to the junction (Rule 135, Record page 570) and this carrier (respondent) must account to the initial line (Rule 118, Record page 570). The outbound movement from the junction is a separate transportation movement under a new waybill (Record pages 171-172) and the destination carrier in that waybill accounts only to lines engaged in the movement from the junction to final destination (Record page 171 et seq. and C. Exhs. 42 and 43, Record pages 189 and 191). The final destination carrier is not required to account to lines up to the junction point. We will argue this point, that we are not required to sue the E. J. & E. for the accounting and that we are entitled to an accounting from respondent, in our supporting brief. The above is an important question which has not been, but should be decided by this Court. A great deal of traffic is handled every year on these junction settlements all over the United States, and it would seem to be important to have it authoritatively determined whether or not an initial carrier can look to a settling carrier at the junction for its division or, as the opinion below decides, must pursue some distant carrier at final destination.

B.

The Questions of Local Law Involved in This Case Are Important, and the Circuit Court of Appeals Has Decided Them in a Way That Is Untenable and Therefore Probably in Conflict With the State Law as Yet Unannounced by the Supreme Court of Missouri.

This court has indicated that such a situation warrants certiorari (Ruhlin v. New York Life Insurance Company, 304 U. S. 202, Syll. 4, l. c. 206). This claim was filed in the bankruptcy proceedings pending in the United States District Court for the Eastern District of Missouri for the reorganization of respondent railroad (11 U. S. C. A., Sec. 205), and the Missouri law should have been applied. The Supreme and Appellate Courts in Missouri have not as yet had occasion to decide the questions of law involved in this case. As we have indicated above and as the supporting brief will more fully develop, the Circuit Court of Appeals has decided the question of petitioner's legal right to hold respondent responsible for the collection and accounting to it of its agreed division out of the joint rate, and the question of the scope and effect of the decisions of the Arbitration Committees, in a way that is untenable, and in conflict with agreed upon accounting rules and practices, and in conflict with the weight of authority. It cannot be assumed that the Missouri Courts would so erroneously rule, and we say therefore as did this Court in Ruhlin v. New York Life Insurance Company (Supra, l. c. 206), "the decision below was 'probably untenable' and therefore probably in conflict with the State law as yet unannounced by the highest court of the State" and certiorari should be granted.

C.

The Case Presents an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

Questions 3 and 4 stated supra under the Heading "Questions Presented" involve an important question of Federal law as to whether or not under the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4 and Sec. 15, Par. 6), the Illinois Lines could legally establish a division of 10¢ per cwt. by the method they pursued in this case. Under point 1 of the argument in the supporting brief, we state the argument against the right to so establish a division of a joint rate. The opinion below refused to decide this question (R. 597, 598).

The exact question here presented has not been decided by this court. It involves an interpretation of the above sections and paragraphs of the Act to Regulate Commerce which is, of course, a Federal question. The correct decision of this question is a matter of great importance to all railroads whose rates and divisions are subject to Federal regulation and we submit certiorari should be granted.

PRAYER FOR WRIT.

Wherefore, petitioner prays that this court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceedings in the cause numbered and entitled on its docket as No. 13346 in Bankruptcy, the Texas and Pacific Railway Company, Appellant, v. St. Louis Southwestern Railway Company, Debtor, Appellee, and that said judgment of

the said United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

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Of Counsel.

BRIEF

In Support of Petition for Writ of Certiorari.

The **statement of the grounds of jurisdiction**, the **statement of the case**, and the **specification of errors**, required by Rule 27, are all set out in the foregoing petition for certiorari.

SUMMARY OF THE ARGUMENT.

It is the contention of petitioner that when the joint through rate on crude oil from Wickett, Texas to Whiting, Indiana was established there was complete agreement among participating carriers on their respective divisions, and that under this agreement the division accruing to the Illinois lines for their entire service from East St. Louis to Whiting was 6½¢ per cwt. and that this basis remained in effect until superseded by a new agreement published July 1, 1931 (Record pages 119, 147), after all of these shipments had moved. That the attempt of the Illinois lines over the objection of the other participating carriers to increase their division to 10¢ per cwt. was wholly arbitrary and unauthorized and did not result in establishing 10¢ per cwt. as their lawful division. That the portion of the 32½¢ rate legally accruing to East St. Louis was 26¢ per cwt. and that there was complete agreement between petitioner and respondent on the division of this 26¢, to-wit: 16.9¢ per cwt. to petitioner and 9.1¢ per cwt. to respondent. We contend that by changing the destination named in these waybills from Whiting to East St. Louis respondent made itself the waybill destination carrier, and hence the settling carrier, as respects revenue accrued to that point, and that under the accounting rules and practices to which respondent had agreed it was bound to collect the proper revenue to East St. Louis, to-wit: 26¢ per cwt., and that

whether it actually collected the full amount or not, absent a showing that the full amount was uncollectible, it was bound to account to petitioner for 16.9¢ per cwt. in accordance with its division agreement with petitioner.

Petitioner contends further that the submission of a disagreement over the interpretation of the Mandatory Freight Accounting Rules to the Arbitration Committee, does not preclude Court action to enforce legal liabilities created by those rules, and by agreed accounting practices.

Petitioner further contends that the said Arbitration Committees by reason of their limited jurisdiction were unable to decide and did not decide the controlling questions of law between petitioner and respondent herein, and that their award does not control the decision of this case. And finally that the questions presented by this record are important and warrant certiorari as indicated in Supreme Court Rule 38 (5) (b) and previous decisions of this Court.

ARGUMENT.

I.

The Illinois Lines Had No Legal Right by Unilateral Action to Terminate Their Agreement to Accept a Division of 6½¢ Per Cwt. Out of the Through Rate Applicable to These Shipments and Over the Objection of the Other Participating Carriers Exact the Division Arbitrarily Fixed by Them at 10¢ Per Cwt.

The above is an important question of Federal law arising out of section 1 (4) and section 15 (6) of the Act to Regulate Commerce (49 U. S. C. A., sec. 1, par. 4, and sec. 15, par. 6).

The evidence in this case conclusively proves that at the time the through rate of 37¢ per cwt. was established the Illinois lines agreed to accept 20% of the Fort Worth rate,

which was then 32½¢ for their service from East St. Louis to Whiting. This was a basis of long standing whereby the Illinois lines received a division over East St. Louis on crude petroleum from Texas points equal to 20% of the Fort Worth rate (Record pages 133 and 325 et seq.). The Illinois lines expressly agreed to this basis and agreed specifically that their division would be 6½¢ per cwt. (See C. Exhs. 6, 6 [1], 6 [2] and 6 [3], Record pages 62, 64, 65 and 67, and C. Exhs. 7, 8, 9 and 10, Record pages 70, 71 and 72; C. Exh. 11, Record pages 76 and 77.) It will be noted that the above divisional basis was **not** conditional on the amount of the rate from Wickett to Whiting. This agreed divisional basis was not changed when the rate from Wickett to Whiting was reduced to 32½¢. The entire reduction was absorbed by Petitioner. There was no reduction in the division accruing to the Illinois lines (Record pages 119-120). When a carrier like Petitioner has traffic originating on its line and finds it necessary to grant rate reductions in order to satisfy shippers or to meet competition it discusses the reduction **only** with the carriers whose revenue (divisions) will be affected. It can be assumed that other participating carriers will be satisfied as it is all to their benefit, the reduction holds the traffic to their rails without cost to them. Hence the Illinois lines not being asked to share in the reduction were not consulted, nor was it customary that they be consulted (D. Exh. 12 [a], Record pages 419 and Record pages 119 and 120). The Illinois lines made no objection to the reduction and in fact **duly published their participation in the reduced rate** (Record page 60), without negotiating any agreement with the other participating carriers on any change in the divisional basis.

The law provides a procedure whereby a carrier dissatisfied with its division of a joint rate may obtain relief if so entitled. Par. 4 of Sec. 1 of the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4) requires carriers to

establish divisions of joint rates. When upon complaint the Commission is of the opinion that such divisions are unjust and unreasonable, it may by order prescribe divisions (49 U. S. C. A., Sec. 15 [6]). Or the Commission may, "upon its own initiative," institute an inquiry and prescribe divisions (49 U. S. C. A. 15 [6]). Or where, as in this case, the joint rate was voluntarily established by the carriers, any participating carrier is at liberty at any time to withdraw its participation if dissatisfied with its division. In this case, however, instead of withdrawing concurrence in the rate or filing a complaint with the Interstate Commerce Commission, the Illinois lines resorted to force.

On August 6, 1928, they caused C. W. Galligan, Chairman of the Illinois Freight Association, to address a notice to the southwestern lines entering St. Louis to the effect that they would no longer be bound by the divisional agreement, and that on and after August 15, 1928, they would require a division of 10¢ per cwt. (Record pages 120 to 123), and over the protest of the southwestern lines to whom this notice had been addressed, they carried out this threat. On shipments moving after this date on the 37¢ rate they only advanced 27¢ to cover the service up to East St. Louis instead of 30½¢ to which they had agreed and which, up to this time, they had paid. (See Statement in lieu of Debtor's Exhibit 74, Record pages 512, 513.) After September 18, 1928, when the reduced rate of 32½¢ became effective, they continued to withhold this additional 3½¢, and only advanced 22½¢ on junction settlement for the service up to East St. Louis instead of 26¢ as per the agreed divisional basis (see Stipulation of Facts, Record page 37) and on through shipments retained 10¢ for the service north of East St. Louis, and only accounted for 22½¢ for the service up to East St. Louis. (See Statement in lieu of Debtor's Exhibits 37 [c], 37 [d], 37 [e], 37 [f], Record page 501.) Such action on the part of the Illinois lines was

in violation of their contract and gave them no right to the additional revenue that they withheld, and this court has so ruled in the case of Alton R. Co. v. United States (287 U. S. 229).

In that case grain from the West moved into Peoria in large quantities on local rates. It was there stored in elevators, much of it milled or otherwise processed and the grain products moved out to eastern points on so-called "reshipping rates." The Alton participated in this outbound movement from Peoria to connections with eastern lines at Chicago, Dwight or Joliet, and its divisions were fixed by agreement with the eastern lines and duly published in division sheets. Starting July 1, 1929, the eastern lines over the protest of the Alton started reducing its divisions. The eastern lines were physically in a position to do this because being the waybill destination carriers they collected and distributed the freight. In holding that they were legally without power to reduce the Alton's division the Supreme Court said, l. c. 235 and 236:

> "The joint 'reshipping' rates and the divisions thereof were established by agreement of the carriers participating in the transportation. The divisions were a term of that agreement. So long as the joint rates voluntarily established remain in force, each carrier is entitled as of right to the division originally agreed upon, unless a readjustment of the divisions has been made either by the parties or by the Commission pursuant to the power conferred by paragraph 6 of Sec. 15. **The connecting carriers were legally without power to reduce the divisions of the Alton over its objection.** If they deemed its divisions unreasonably large, they could have invoked the power of the Commission to make a reduction. Instead of applying to the Commission to adjust the existing divisions they resorted to force. Availing themselves of their strategic position as collectors of the freight, they withheld from the Alton a part of what was due it."

So in this case the Illinois Trunk Lines were "legally without power to reduce" the revenue accruing to origin and intermediate lines up to East St. Louis. If they were dissatisfied with their divisions north of East St. Louis they should have followed the orderly course of either withdrawing their participation in the rates, or they should have filed a complaint under Sec. 15 (6), supra, of the Act to Regulate Commerce. Instead of following either of the above orderly courses they resorted to force, and we submit that under the express language of the above decision of this Court Respondent had a plain right of action against them. (See also Atlantic Coast Line R. Co. v. Boston & Maine R. Co., 18 F. S. 886, Syll. 5, l. c. 891; 13 C. J. S., sec. 300, page 691.)

We submit that the Court of Appeals should have decided this important question of Federal law, and if it had done so in accordance with the above decision of this Court in the Alton case, it would follow that the Illinois lines were entitled to only 6½¢ per cwt., and that the amount they were required to pay Respondent on junction settlement at East St. Louis was 26¢ per cwt.

II.

Both at Common Law and Under Accounting Rules It Was Respondent's Duty to Collect and Account for 26¢ per cwt. on Junction Settlement With the Illinois Lines at East St. Louis.

It has always been the law that the collecting carrier, by which is meant the carrier who collects and disburses the freight charges, must account to prior lines for their agreed divisions. It was so ruled in the Alton case, supra (287 U. S. 229), where the lines connecting with the Alton reduced the Alton's division. This Court said (l. c. 236), "the connecting carriers were legally without power to reduce the division of the Alton over its objection" and that "the Alton might have sued at law for the part of the

divisions wrongfully withheld" (citing cases) and see also Atlantic Coast Line R. Co. v. Del. & H. R. Corp., 86 Fed. (2) 721, l. c. 723, para. 1.

The reason for this rule of law is the same whether the freight charges be collected by the delivering carrier at final destination, or by the waybill destination carrier at a junction point who makes delivery to a connecting carrier at the junction on junction settlement. In both cases the carrier so making the delivery **collects the freight charges** and is the collecting carrier to whom prior lines may look for an accounting. Mandatory Freight Accounting Rule 118, Record page 570, is but declaratory of this common law rule. By its own act in changing the destinations on these waybills, Respondent made itself the collecting carrier of that portion of the joint rate accruing up to East St. Louis, therefore under the express terms of the Rule, as well as by law, it is "responsible for the **collection** of the **proper revenue**, and for the proper reporting to all roads interested," and this, **regardless** of the fact that the junction point was not the final destination of the shipments. We submit that Petitioner is entitled to hold Respondent to this responsibility.

We pointed out in point II under the heading "Reasons for Granting Writ" that we had no right to an accounting from the E. J. & E. These shipments moved out of **East** St. Louis under **new waybills** issued by the Illinois Trunk Lines, and the E. J. & E., the destination carrier on those waybills, was only required to account to the carriers shown on those waybills as involved in the movement East St. Louis to Whiting. C. Exhs. 35 to 43, Record pages 175 to 193, are samples of the billing and accounting used on these shipments. Ex. 40 is the new waybill issued by the Illinois Trunk Lines at East St. Louis and C. Exhs. 42 and 43 show the accounting between the E. J. & E. and the carriers parties to the movement shown on the new way-

bills. It will be noted that Petitioner received no accounting from the E. J. & E. On the contrary, the whole record shows that such accounting as we received came from Respondent. The entire 14.625¢ per cwt. that Petitioner received on these shipments was all paid to it by Respondent. None of it was paid to Petitioner by the E. J. & E. There was no privity between Petitioner and the E. J. & E., and we do not believe we could have maintained an action against it for an accounting on shipments handled as these were on junction settlements.

The evidence showed that Respondent allowed quite a number of these shipments to go through to destination on the **through interline waybills** that Petitioner issued at Wickett, Texas (Record page 206). There were about 291 such tank cars in one month as to which Respondent did not change the waybills, but allowed the original waybills to accompany the shipments to Whiting. See Statement in lieu of Debtor's Exhibits 37 (c), 37 (d), 37 (e) and 37 (f) (Record page 501). As to these shipments the Elgin, Joliet and Eastern R. R. was the "waybill destination carrier." Acting under instructions from the Illinois trunk lines the Elgin, Joliet & Eastern cut Petitioner's revenue on these shipments so as to allow the Illinois trunk lines the increased divisions they demanded. Petitioner sued the Elgin, Joliet & Eastern in the Federal Court of the Northern District of Illinois and recovered a substantial amount by compromise before trial. See testimony of Witness Oliver (Record pages 206-7).

If Respondent had let the shipments involved in this suit go through on the original waybills issued at Wickett, Petitioner would have been in a position to have included them in the suit against the Elgin, Joliet & Eastern, and it was solely the act of the Respondent in terminating these waybills at East St. Louis that made it impossible for Petitioner to demand accounting of the Elgin, Joliet & Eastern.

The evidence further shows that in many other instances during this period where petroleum products were handled from points on Petitioner's railroad to points in Illinois, Wisconsin and Indiana moving via East St. Louis on **through waybills**, Petitioner was able to obtain settlement or satisfactory compromise from the waybill destination carrier, in cases where it had paid the Illinois lines a division of 10¢ per cwt. (Record page 146).

III.

Other points mentioned in the Summary of the Argument, supra, including our contention that the decisions of the Arbitration Committees, due to their limited jurisdiction, do not control the decision in this case, and the matter of the importance of the questions here presented have, we think, been fully covered in the petition for the writ.

In conclusion, we wish to stress the fact that this is a very unusual case and that it presents questions that are novel and important and the opinion below is, we think, wholly inadequate. It places a finality on the rulings of these Arbitration Committees that is wholly unwarranted and thereby avoids deciding the real issues in this case. We believe that the case calls for the exercise of the supervisory power of this Court and that writ of certiorari should be granted.

Respectfully submitted,

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January 15, 1947.